

DATE ISSUED: NOVEMBER 21, 1996

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CASE NO.: 96-CER-00001

IN THE MATTER OF

PAULA ROBERTS,
Complainant

v.

RIVAS ENVIRONMENTAL CONSULTANTS,
Employer/Respondent

APPEARANCES:

PAULA K. ROBERTS, PRO SE
1824 Lyndale
Odessa, Texas 79762
For Claimant

THOMAS E., REDDIN, ESQ.
Hutcheson & Grundy, L.L.P.
901 Main St., Suite 6200
Dallas, Texas 75202-3714
For Employer

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This proceeding involves a claim under the Comprehensive Environmental Response Compensation and Liability Act(hereinafter "CERCLA"), 42 U.S.C. Section 9601 et seq., pursuant to the Employee Protection Provisions under Section 9610. This claim is brought by Paula K. Roberts, Complainant, against her former employer, Rivas Environmental Consultants, Respondent. A hearing was held in Midland, Texas on April 18th and 19th of 1996. Both parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. Post-hearing briefs were received from Complainant and Respondent. The following exhibits were received into evidence:

1) Complainant's Exhibits No. 1-6, 8-14, 16; and

2) Employer's Exhibits Nos. 1-15.¹

Issues

The issues in this proceeding are:

1. Whether there was a timely written complaint?
2. Whether Complainant engaged in activities subject to protection under CERCLA?
3. Whether Respondent terminated Complainant in violation of CERCLA because she engaged in activities subject to protection under the statute?

Summary of the Evidence

Paula K. Roberts

Complainant was hired as a data technician on February 21, 1995 and was terminated on September 27, 1995. As a data technician, the duties included answering the phone and keeping up with the drum logs. Complainant testified that she acquired various other duties as people left the job or were fired. When the site supervisor left, Complainant obtained his weekly reports to do. In addition, Complainant had drum tallies to do. When the safety and health officer was terminated, Complainant began to print out the 24-hour on site certificates on the computer. Complainant also handled appointments with the doctors' offices and medical files on each employee. Complainant testified that she also handled some of the scheduling for the safety and health meetings. Complainant was responsible for maintaining sufficient supplies. Moreover, Complainant filled out everybody's weekly time sheets. Because of these new responsibilities, the drum logs were back logged. Therefore, Complainant stated that Mr. Rivas allowed her to take the drum logs home so that she could catch up. TR pp. 351-356.

Complainant reviewed all of her absences for the time she was employed with Employer/Respondent. The first absence listed in Respondent's exhibit number six was for May 5, 1995. Complainant testified that she went home early on that day because her child was sick and informed Mr. McNamara of the situation. On June 6th, Complainant spent three hours looking for a babysitter. On June 16th, Complainant showed up four and a half hours late because her truck caught on fire, as she had informed Mr. Rivas. On July 12th,

¹ The following abbreviations will be used in citations to the record: CX - Complainant's Exhibit, RX - Respondent's Exhibit, and TR - Transcript of the Proceedings.

Complainant's son was ill. On July 13th, Complainant went to work, but was called because her son was sick. So, she had to leave to take her son to the doctor, but returned later. On August 2nd, Complainant was gone for one hour for parent registration for her son. On August 14th, Complainant testified that Mr. McNamara sent her home because she had a migraine. On August 15th, Complainant took some extra time after lunch because she had to take her son for a football physical. On September 7th, Complainant missed three and a half hours of work because she took her son to the doctor. On September 8th, Complainant departed the work station at two o'clock to take her son to the doctor. Complainant testified that her son was out of school during the 5th, 6th, 7th, and 8th of September. On September 13th, Complainant was absent for about two hours because she had to take her son to the hospital for some testing. On September 14th, Complainant departed the work site for three hours because she had to take her son to the dentist. The visit took about two hours, but because it was raining, Complainant testified she called and spoke with Mr. White who told her there was nothing she could do that day. On September 19th, Complainant was gone for about an hour because she had to get a tetanus shot for a puncture wound to the calf. Complainant testified that she discussed the shot with Mr. Rivas. On September 25th, Complainant left the work site because she was informed that her daughter had fever. Complainant picked her up and took her to the doctor's office. Complainant testified that she spoke to Mr. White and told him she was not returning because she did not have a babysitter. On September 26th, Complainant was absent for the whole day because she testified that she almost completely lost her voice. Complainant testified that she talked to Keith and told him she would not be in for the day. Complainant testified that the entire time she worked for Employer she was absent 38.5 hours total, but 24.5 of those hours were taken in the month of September. Complainant noted she was never written up and never saw an employee handbook. Complainant was notified on September 19th that from then on sick leave was to mean only employee sickness, not family sickness. Complainant testified that she was requesting additional time off in October of 1995. TR pp. 361-367, 375, 413, 415-416.

Complainant described one incident at work that occurred on September 18th. On that day, Complainant was asked to go home because it was raining outside. But, Complainant told Mr. Rivas that it was not hindering her work inside. Nevertheless, Complainant had to leave that day with the rest of the hourly employees although they did not get paid for that day. Complainant also described another incident concerning the drum logs. Complainant testified that during a conversation with Mr. Rivas and Mr. White she told Mr. Rivas about her falsification of the drum logs, but Mr. Rivas told Complainant that he never asked her to forge documents. Complainant was concerned because when she worked on the drum logs the only information she was given was the number

of the drum. Complainant was not apprised of what size the drum was, if the drum was cleaned, or if the drum actually went out on any shipment. Complainant testified that she was advised, later on in the project by Mr. Fife, that the EPA did not care if Mr. Rivas was keeping track of these drum logs. In addition, Complainant noticed that she was no longer doing certain types of duties like the time sheets and weekly reports. But, Complainant did testify that some of the responsibilities that were taken away from her were duties that belonged to a QAQC manager who was hired on September 5th. Next, Complainant described the day that she was terminated. On September 27, 1995, Mr. Rivas met Complainant at her truck and told her that her services were no longer required due to absences. Complainant then asked for her time sheets and belongings, but she was not given the time sheets or the belongings at that time. TR pp. 374-379, 418, 423.

Complainant testified that she did have knowledge of what went on at the field site. Complainant attended safety meeting on Fridays where employees would discuss what was going wrong on the site. Complainant also had a radio that sat on her desk which picked up conversations occurring on the field site itself. Complainant was responsible for typing up the site deficiency lists of Mr. McNamara. In addition, Complainant was responsible for filling out the accident reports when they came in. Complainant testified that she would go out and stand on the porch every day. Complainant testified that she did voice her concerns to Mr. Rivas. Complainant testified that she told him about her concerns in regards to the hot, cold and warm zones that she felt were not properly set up. In addition, Complainant testified that she discussed with Mr. Rivas the issue of the poly drums being opened and the danger of emission into the air. Complainant also discussed her concerns with Ms. Rivas. Complainant explained that she spoke to Ms. Rivas on a daily basis. Complainant testified that she told Ms. Rivas that she was afraid that chemicals were being spilled on the ground and that an employee could spill the chemicals on himself because the employees were using an old light fixture to pour chemicals. Complainant recommended to Ms. Rivas to buy drum funnels from another drum company. Complainant also discussed with Mr. McNamara the problem with leakage from the drum crusher spilling onto the ground. TR pp. 367-368, 404, 407-408.

Complainant testified that she first spoke with Ms. Pat Bradley, from the Department of Labor, concerning her complaint on the phone on August 14, 1995 and then sent her a letter that Ms. Bradley received on August 17, 1995. Complainant testified that in the letter she stated that there was insufficient air monitoring because for about one month there was no HNU on the site to test the area, but only an Explosimeter. After Complainant sent the letter to Ms. Bradley, she testified that she received a phone call from Ms. Sheila Shulleberger with OSHA who asked her whether she thought anybody was in danger. Complainant testified that she explained to her the incidents with ethyl mercaptin that was being

crushed, the parathion drums, and the H2S drums. After the letter to Ms. Bradley, Complainant said there was an investigation conducted by Ms. Shulleberger with OSHA. Complainant testified that the night before the investigation Mr. Rivas called her and told her to tell the truth, but if he went under then all went under and would lose their jobs. On the first day of the investigation, Complainant testified that Mr. Rivas told her that effective immediately he was the safety and health officer on site. Complainant testified that Ms. Shulleberger, who conducted the OSHA investigation, was not allowed to go on the site, but only interviewed employees. Complainant responded that she believed she was terminated because she had filed the initial complaint with OSHA as described above. In regards to CERCLA, Complainant testified that she called Ms. Rosanna Nardizzi and Mr. Gerald Foster in Dallas on September 27, 1995, the day she was terminated. Complainant explained that she had contacted Ms. Nardizzi because she felt violated as a whistle-blower and asked her what she needed to do to file a complaint against Employer. Complainant orally gave her a statement. Complainant testified that Ms. Nardizzi told her she could file under CERCLA or 11(c). Complainant submitted into evidence the oral complaint which was prepared by Ms. Nardizzi from OSHA as an internal memorandum, which Complainant received by fax at Ms. Renee Witherspoon's house and which described that Complainant could see from her job trailer the drums being opened all over the site outside. Complainant was instructed to make changes to the fax which she did. Some time later, Ms. Nardizzi called Complainant back to discuss if she had knowledge of certain things concerning the site. Complainant explained that she was involved in safety meetings every day, wrote up site deficiency reports, and could see what was going on at the site. TR pp. 32-42, 49-51, 369-371, 373, 379-380, 429.

After an initial investigation was made, the U.S. Department of Labor sent Complainant a letter describing the various allegations she had made. Complainant testified that about two months before her testimony she spoke with Ms. Bradley about the letter. Later, Complainant, Mr. J.D. McNamara, and Ms. Annette Haynes went to Lubbock for a meeting to get a full documentation of the alleged complaints on the site. Complainant testified that she was not told that there was a thirty day time limit to file a written complaint, but was phoned by Ms. Nardizzi who told her that she needed something in writing. Complainant then put her issues in writing and mailed them to Ms. Nardizzi. Complainant agreed that the only document that she personally prepared and sent to the Department of Labor regarding her termination from employment was mailed in the latter part of November of 1995. In the complaint, Complainant describes that her initial concerns were with the safety and well-being of the workers on the job site. Complainant explained that in the complaint she did not write actual violations because she was told by Ms. Nardizzi to be brief since everything was on the internal memorandum. Complainant testified that the reason she waited until November to file her written complaint was

because she was waiting for information from an attorney. Complainant agreed that she never filed a written complaint with the Environmental Protection Agency("EPA"), but did talk to Mr. Greg Fife, the on-site coordinator on the site. At the time of trial, Complainant had a case pending against Respondent also under Section 11(c) of OSHA. TR pp. 43-45, 47-48, 52-57.

Complainant testified that she never informed Mr. Rivas that she had filed a safety complaint with OSHA and never had knowledge that someone else informed him of the fact. Complainant admitted that after the OSHA investigation of the fifteen various allegations only two had merit. Complainant testified also that she was never guaranteed that she would work until the conclusion of the project. TR pp. 409, 412, 416.

Renee Witherspoon

Ms. Witherspoon testified that she was site safety and health officer for Employer/Respondent from February 27, 1995 to March 28, 1995, well before Complainant was terminated. Ms. Witherspoon is currently a certified safety professional. She was previously an OSHA inspector for three years as an industrial hygienist. Ms. Witherspoon testified that she felt there was health and safety violations at the site and formulated site deficiency lists concerning her complaints. In February of 1995, Ms. Witherspoon was Respondent's insurance agent with the Texas Workers' Compensation insurance fund before she was working for Employer/Respondent as the site safety and health officer for the Odessa site. Ms. Witherspoon wrote a report which outlined various violations. The first violation was inadequate eyewash or shower facilities. In addition, Ms. Witherspoon recommended that the safety and health risk analysis for each task be completed. Ms. Witherspoon next noted her concern about work zones not being set up, but she testified that she thinks this was taken care of later. TR pp. 74-80, 87, 93.

Ms. Witherspoon described the site as an old drum reconditioning facility that had gone into Superfund. Therefore, Employer/Respondent was cleaning up the drums in order to get them back to standards set by the EPA. Employer/Respondent was supposed to use personnel to remove the drums, crush them, dispose of them, and take care of any free liquids or other waste in accordance with guidelines. The contents of the drums had to be analyzed and segregated in accordance with what types of chemicals were present. Ms. Witherspoon testified that most of the substances she was familiar with in the drums were in liquid form. Ms. Witherspoon responded that some of the drums were open before Respondent was contracted to clean the site up. Ms. Witherspoon admitted that her personal knowledge of the drums derived from the drums that were open, had dried up, or had dirt in them. There were drums that were still sealed. Ms. Witherspoon explained that while she worked

for Respondent she took pictures of drum lids and things that were dug up under the ground when a backhoe sunk. TR pp. 80-85, 92-93.

Ms. Witherspoon testified that to her knowledge there was no company handbook. In addition, she did not recall any meetings that took place at the site concerning absences. Ms. Witherspoon's duties as a health and safety officer were setting up physicals for the employees, daily monitoring of employee activities to assure the safety of the employees, participating in morning safety meetings, getting personal protective equipment for employees, and updating paperwork on the site and safety and health programs. Ms. Witherspoon was terminated on March 28th for various reasons. First, Ms. Witherspoon testified that Mr. Rivas told her the health and safety program was not site-specific. Second, there was too much information on confined space entry. Third, Ms. Witherspoon testified that she was told she did not know anything about EPA regulations. Finally, it was stated that she was not qualified for the work along with the problem of her work not getting done. Ms. Witherspoon admitted that she was written up once by Mr. McNamara for not finishing the monitoring one afternoon. Ms. Witherspoon testified that she did receive a fax on September 28, 1995 from OSHA. TR pp. 85-89, 95.

Johnnie D. McNamara

Mr. McNamara testified that he was the project manager for Employer/Respondent until August 25, 1995 and was additionally Complainant's immediate supervisor. Mr. McNamara noted that while he worked for Employer/Respondent he had no problems with Complainant's work performance. Mr. McNamara also testified that in regards to every absence Complainant took while he was employed with Employer/Respondent he was informed of the reason. Mr. McNamara testified that he had safety concerns and formulated a site deficiency report that was faxed to Mr. Rivas at his office in Amarillo. In his opinion, there were toxic substances that were handled, disposed of, stored, and processed at the particular work site in question which Mr. McNamara had concerns about. On the site deficiency list, Mr. McNamara noted concerns about not having adequate equipment to test the drums to see what they contained and personal protective equipment for the individuals. Under personal protective equipment, Mr. McNamara noted a need for suits with greater permeation resistance and better quality gloves for chemical handling. In addition, he noted that there was no self-contained breathing apparatuses on location. Mr. McNamara noted that what led him to believe there was dangerous chemicals in the area which could pose a danger to the employees was the labels that were on the drums and his background knowledge of oil-field chemicals. Mr. McNamara stated that some of the drums were open while some were closed. Mr. McNamara recounted a situation where one leaky drum was put in the back of a pickup and hauled down the street leaking. Mr. McNamara also noted that the health and safety program was never fully completed while there was no health and

safety officer on site for the entire period of time. Mr. McNamara stated there was not sufficient first-aid and CPR-trained personnel on site. The other concerns were not having a full crew working, having inexperienced personnel on location, having no credit cards to purchase fuel, parts, or supplies, having inadequate chemical reference material and regulatory reference materials, having insufficient air monitoring, not having change or shower areas available, and having inadequate spill response equipment. Mr. McNamara noted also that there was no drum patch which would mean that if a drum started to leak there was nothing he could do to stop it from leaking on the ground. Mr. McNamara stated that for a long time there was no overpacks or salvage drums. Mr. McNamara recommended also the use of fluid transfer pumps to transfer bulk material into drum or holding tanks. Finally, Mr. McNamara testified that storage tanks for the rinse water, saws-all to cut the poly drums, pneumatic nibbler, which is an air-operated deheader for steel drum deheading, drum sling, solid waste disposal containers, and a pH meter were all needed. TR pp. 98-100, 104-105, 107-113, 127.

Mr. McNamara testified that he spoke to Mr. Rivas about the site deficiency list. He noted that although he was given a credit card, he was not allowed to purchase equipment without approval from Mr. or Mrs. Rivas. The QAQC on site for a short period of time was Mr. Jim Yarr(phonetic). After Mr. Yarr was terminated, Mr. McNamara stated that the duties of ordering and keeping up with the supplies and mail runs daily were performed by Complainant. Moreover, after Ms. Witherspoon was terminated, her duties of taking care of medical records, setting appointments, getting things ready for the safety meetings were assigned to Complainant. Mr. McNamara noted that Complainant took care of the drum reports, ran errands, and picked up supplies after Mr. Mark Maynard was dismissed. In his opinion, Complainant's participation in the safety meetings and the formulation of site deficiency lists gave her the knowledge needed to write a letter to OSHA. Mr. McNamara testified that he did help Complainant construct a letter to Ms. Bradley, but he did not write it. Mr. McNamara noted that to his knowledge Complainant was never written up or told by him that she had excessive absences. Also, Mr. McNamara stated that he did not feel Complainant had excessive absences especially since he believed there were other employees he supervised who had more absences. In describing Complainant's job performance, Mr. McNamara testified that Complainant went above and beyond her duties because she was asked to do things she was not hired to do. Mr. McNamara noted that he did not directly contact individuals at OSHA and make false statements about Employer, but was contacted by OSHA. Mr. McNamara did state that he had contacted Ms. LaVerne Baker with the EPA and Ms. Vicky Norton with the Small Business Administration("SBA"). TR pp. 113-115, 117-121, 139-140, 144.

Mr. McNamara described the drum logs with more detail. The drums logs were a list of all the drums. All of the drums at the site would have to be identified with a number and bar code affixed to them with a bar code reader. The bar code would be a tracking device for that drum to monitor it through the process. If the drum had hazardous materials in it, it would be combined with like waste streams and profiled and sent for disposal. If there was no hazardous material, then once the drum was crushed, the information on the steps taken in the process was logged. There would need to be a determination of the size of each drum, what was in it, and whether it had any hazardous material. This information would all be recorded in the drum log. Mr. McNamara noted that the drum logs were not completely correct because all he would turn in daily was the number of drums crushed. But, as far as being able to try to determine which drum had what contents in it, as the drum log had them written down, that was not correct. Mr. McNamara noted that it ended up being that Complainant would just write numbers continuously down on the drum log. Mr. McNamara stated that he talked to Mr. Rivas and Mrs. Rivas about the possibility of Complainant doing the drum logs at home so that she could make up some of her time missed from work. Mr. McNamara stated that they both agreed to allow Complainant do drum logs at home as long as she recorded it on her time sheets. Mr. McNamara testified that at no time did Mr. Rivas or Mrs. Rivas decide that Complainant's drum logging at home was unacceptable. TR pp. 131-135, 137-138.

Mr. McNamara testified that a health and safety plan, a quality assurance and control plan, and a work plan had been prepared by Employer and submitted to the EPA. In addition, there was an EPA official monitoring the job site, Mr. Greg Fife and a technical assistance team through Ecology and Environmental, Inc. who was also monitoring the job site for the EPA. Mr. McNamara testified that Mr. Fife did not spend more than five or six hours out at the sight while the technical assistance team spent even less time. Mr. McNamara testified that he did raise various concerns about the work site with Mr. Fife and with the Ecology team. During some of his discussions, Mr. McNamara stated that Mr. Rivas was present. But, Mr. McNamara noted that he was not fired because he had raised these issues. Mr. McNamara testified that Mr. Fife responded that he was concerned about these issues and later told him that all these problems would be taken care of. But, Mr. McNamara never filed a written complaint with the EPA. Mr. McNamara stated that he was not the one who recommended the termination of Ms. Witherspoon. But, he did assign part of Ms. Witherspoon's air monitoring duties to Ms. Annette Haynes although he did not think Ms. Haynes was qualified. TR pp. 141-143, 147-150, 171.

When Mr. McNamara resigned on August 25, 1995, he gave no advance notice. Mr. McNamara stated that the reason he gave for leaving at the time was that he had a better paying job. Mr.

McNamara admitted that there was some ill will between him and Mr. Rivas because of the way the site was being managed. Mr. McNamara testified that he did talk to Ms. Baker of the EPA concerning the alleged violations in his site deficiency report, but he did not call her directly. Mr. McNamara also talked to Ms. Norton with the SBA. Mr. McNamara stated that the EPA told him if there were concerns like that present that the SBA would need to be contacted. Mr. McNamara testified that Complainant spent time at the field site bringing water and supplies while the rest of the time she spent in the trailer which was maybe one hundred feet away from the chain link fence where the actual work was performed. TR pp. 151-155, 158, 163.

Mr. McNamara testified that he did not allow Complainant to set her own work schedule. Mr. McNamara noted that there were times when he would direct Complainant to go get supplies that she would tell him that she was going to run errands. Therefore, since it was almost the end of the day, she would go home directly after. Mr. McNamara stated that some employees were probably absent more than Complainant, but he did not have the time sheets to know the exact days missed. TR pp. 166-169.

Mary Ann Salcido

Ms. Salcido testified that she started as a laborer for Employer/Resondent and eventually went on to test chemicals. Ms. Salcido noted that she never saw an employee handbook. Ms. Salcido testified that there was a meeting concerning absences which was attended by employees who worked on the site, but Complainant was not present at the meeting. Ms. Salcido agreed that to the best of her knowledge her absences were probably in excess of about thirty-eight hours. As a chemical tester, Ms. Salcido tested various chemicals to determine if the chemical was a neutral, a base, or an acid which would allow one to determine if the chemicals could be mixed together. Mr. Salcido noted that parathion was found on the site along with some corrosive or ignitable chemicals. In order to determine which drums were crushed or not, Ms. Salcido testified that if there were no chemicals in the drums they were crushed. The only drums that were tested were the ones that had liquids in them and the ones that had bungs, which are lids that go on top of the barrels. Ms. Salcido testified that there were times that some drums were crushed which still had contents in them. If there was something in the drums, Ms. Salcido and others tested it and wrote on the drums whether the content was an acid, a base, or a neutral and the level of the acid, base, or neutral. Ms. Salcido testified that she did express concerns about the atmosphere and the ground to Mr. McNamara because of the process of crushing barrels. Ms. Salcido explained that once when the barrels were being crushed there was one barrel that still had something in it that was therefore being spilled onto the ground. Ms. Salcido testified that the day of the OSHA investigation Mr. Rivas became

safety and health officer, but she would only see him occasionally on the site after that. Ms. Salcido testified that on September 18, 1995 Mr. Rivas sent all hourly employees home because of the rain but allowed salaried employees to stay. TR pp. 178-193.

Ms. Salcido explained that when Complainant was on the site she would bring water to the people out on the site or equipment that would be needed. Ms. Salcido also testified that she was aware of times after Mr. McNamara quit that Complainant remained after everyone left the site to answer the phones. Ms. Salcido noted that after Complainant was terminated employees continued to be absent from work, but Ms. Salcido admitted that she only worked for a week after Complainant was terminated. Ms. Salcido testified that she never told Mr. Rivas that she thought or knew Complainant had filed a complaint with OSHA. TR pp. 194-198.

Barbara Chelette

Ms. Chelette testified that she would pick up Complainant's children after school and care for them until after Complainant returned from work which usually was after five. There were times that Ms. Chelette took care of the children when they were sick. Ms. Chelette noted that Complainant's son, Jeremy, was home during the time of September 7th because he had bleeding ulcers. TR pp. 202-203.

John M. Moore

Mr. Moore testified that he was the equipment operator and also did some sampling for Employer/Respondent. Mr. Moore was employed from February of 1995 to about the middle or latter part of October 1995. Mr. Moore's duties before he left included mostly combining chemicals and cutting up the poly drums. Mr. Moore noted that he never saw an employee handbook or attended a general meeting concerning absences. Mr. Moore testified that he was sure that he had absences anywhere from about forty-three to forty-six hours. Mr. Moore explained that at one point his grandmother was sick which accounted for two days that he missed from work. Then, the other absences were personal absences for doctor's appointments. Mr. Moore testified that he addressed safety concerns to his supervisors, Mr. McNamara and Mr. Wright. His concerns were that there were times that he would be combining chemicals which he did not feel comfortable with because he was not qualified or ever trained to do that and was not sure whether or not he was wearing sufficient protective gear. Mr. Moore admitted that he was written up once for an absence about a week or so before he left which was the main reason he eventually left. On September 5, 1995, Mr. Moore testified that Mr. Rivas did tell him he would become health and safety officer immediately. Mr. Moore testified that he was never involved in pouring chemicals on the ground or emitting them to the air on purpose. Mr. Moore noted that Complainant was at work sometimes after everyone left to

answer phones. Mr. Moore was aware that Complainant called OSHA on Employer. Mr. Moore testified that Complainant would be on the site itself quite often to get water, run errands, and bring the employees on the site things which they needed. In addition, Mr. Moore noted that when Complainant ran errands she would use Mr. Rivas' Suburban which was equipped with an emergency shower inside. Mr. Moore testified that there was no other emergency shower facilities on site. TR pp. 205-215.

Annette Haynes

Ms. Haynes testified that she was a laborer from March until December of 1995 when she finished the job for Employer/Respondent. As a laborer, she would throw the drums to the drum crushers and put them in the backhoe when they were crushed. Ms. Haynes noted that she never had seen an employee handbook or had knowledge of a general meeting concerning absences. Ms. Haynes did testify that one day, just a few days before Complainant was terminated, Mr. Wright walked outside and told the employees that happened to be out there that people better quit missing work because Mr. Rivas was fixing to make an example. Ms. Haynes remembered that Complainant was not present. Ms. Haynes testified that she missed about seventy hours of work while she was there because of sick children, but some of the time was vacation time that she was not paid for because she had no vacation time accrued at the time. Nevertheless, Ms. Haynes was not written up for her absences. When Ms. Haynes came to work, the QAQC was Mr. Jim Yarr, who eventually was terminated, but never replaced. TR pp. 217-221, 241.

Ms. Haynes explained her duties more fully. Ms. Haynes sampled the contents of the drums, did the compatibility testing and the air monitoring, and did the inventory of the trailer outside as far as what equipment would be needed. The drums which had fluids in them or solids were the only ones that were tested. Basically, if the drums had over two inches of chemicals, the drums were then tested. Ms. Haynes testified that the way the determination was made of which drums had two inches or not was that the employees would pick the drums up and feel how much was in them and decide whether or not they went to the drum crusher or not. Ms. Haynes noted that the drums that had less than two inches of chemicals were crushed before they were monitored with whatever happened to be in them running onto the unprotected ground. The only training Ms. Haynes had in regards to chemical testing was a book and some instruction from Jim Yarr, but Ms. Haynes testified that she did not feel she was adequately trained. Ms. Haynes noted that she did voice concerns about the site to Mr. McNamara because Ms. Haynes and the other employees would be moving the chemicals with a bucket and a funnel and were afraid the chemicals would seep through. So, Mr. McNamara tried to get some pumps, but that never did occur. There were some plastic hand pumps which could not be used because the fluids were too thick to go through the pumps.

Ms. Haynes testified that when they would start cutting the tops off the poly drums and if there happened to be anything in the drums, they would try to get the stuff out of there quickly, but there were times that the chemicals poured on the ground. Ms. Haynes noted that there were probably thousands of drums that this happened to. Ms. Haynes testified that Mr. Wright instructed them to empty out the contents in that fashion. TR pp. 221-226.

The night prior to the OSHA investigation Ms. Haynes testified that Mr. Rivas phoned her to tell her about the investigation. Ms. Haynes explained that Mr. Rivas told her to tell the truth, but to also remember who she worked for because if he lost the job then all the employees would loose their jobs. On the day of the investigation, Mr. Rivas stated that from that day on he was the health and safety officer. Ms. Haynes testified that after Mr. McNamara left, Mr. Rivas was on the site several days a week while she only saw Mr. Fife there about five or six times. Ms. Haynes testified that there were safety meetings conducted in the mornings and on Fridays. She recalled Complainant being present at the safety meetings on Fridays. Ms. Haynes noted concerns because when she started there were no SCBA's on the site. In addition, there were some drums that had been crushed and put off an odor which made employees experience headaches. Ms. Haynes testified that she noted these concerns to Mr. McNamara. Ms. Haynes testified that she was aware that Complainant would be left on the site after everyone else had left for the day to answer the phones. Ms. Haynes was also aware that Complainant had called OSHA. TR pp. 227-230.

Ms. Haynes noted that when she was testing drums there was about thirty-six parathion drums she found in the southeast corner. Out of the thirty-six drums, Ms. Haynes shipped two of them, but did not know what happened to the other thirty-four drums. Ms. Haynes testified that shortly after Mr. McNamara left she contacted OSHA and initiated a complaint. Nevertheless, Ms. Haynes noted that she worked until the completion of the job. Ms. Haynes testified that she would see Complainant frequently on the porch of the trailer. From Complainant's vantage point, Ms. Haynes noted that she could see one section of the site. TR pp. 233-234, 242.

Mark A. Maynard

Mr. Maynard testified that he was site supervisor for about three months for Employer/Respondent. Mr. Maynard's last day of employment was June 1, 1995. As a site supervisor, Mr. Maynard would check the time sheets, write daily reports, note equipment and supplies that were used on the site, and pick up supplies. When picking up supplies, Mr. Maynard noted that he was not given a time frame to be back. Mr. Maynard testified that he did not recall seeing an employee handbook or having knowledge of a general meeting concerning absences. Mr. Maynard noted that he was aware

that Complainant took drum logs home in order to keep them up-to-date and would see the time taken at home to do the drum logs represented on Complainant's time sheets. Mr. Maynard explained that the drum logs took a considerable amount of time to complete because of the handwriting involved. Mr. Maynard testified that there was never any question brought up between himself and Mr. McNamara concerning the drum log time. TR pp. 246-251, 254.

Mr. Maynard testified that shortly before he received a letter from Mr. Reddin, Ms. Vicky Norton with the SBA contacted him to ask him questions about the site. Mr. Maynard noted that during his time of employment Complainant's job performance was excellent. Mr. Maynard commented this to Mr. McNamara. Mr. Maynard testified that Ms. Rivas indicated to him that she was also impressed with Complainant's abilities. In addition, Mr. Maynard noted that during his time of employment Mr. Rivas never indicated that he was not happy with Complainant's job performance. TR pp. 253, 257-258.

Jesus Olivares

Mr. Olivares worked as a drum crusher operator from about March 1995 to mid-December 1995 for Employer/Respondent. Mr. Olivares testified that he never saw an employee handbook and was never involved in a general meeting about absences. Mr. Olivares estimated that he was absent from work about thirty-two to forty hours during his time of employment. Mr. Olivares noted that the day after Complainant was terminated he was written up by Keith for absences. Mr. Olivares testified that during his period of employment Mr. Rivas was probably on the site six or seven days at the most. But, after Complainant was terminated, Mr. Olivares noticed that Mr. Rivas was at the site more often. Mr. Olivares never voiced any safety concerns. TR pp. 265-269.

As a drum crusher, Mr. Olivares was responsible for determining which drums were to be crushed or not to be crushed. The determining factor was if the drum had more than two inches of substance in them. There were times when the bungs were taken off the drums that there was a chemical that emitted an odor, but the drum was closed after a while. Mr. Olivares testified that drums were allowed to set open and emit into the air. Mr. Olivares noted that there were about thirty to thirty-five parathion drums on the site located in the back that were crushed by Keith. Mr. Olivares testified that the chemical that happened to be in the parathion drums was therefore spilled on the ground. Mr. Olivares testified that Mr. McNamara told him the contents of the drums were hazardous. In regards to the parathion drums, Mr. Olivares noted that the drums were sawed in order to see whether or not the contents were less than two inches. If the contents were less than two inches, then the drums were turned over onto the ground. Mr. Olivares admitted that if there was less than two inches of chemicals in the drum it was tested by Annette before the drum was

turned over onto the ground. Mr. Olivares testified that he did remember Complainant remaining at the job after quitting hours. The day prior to the OSHA investigation Mr. Olivares testified that Mr. Rivas called him and told him to answer the questions to the best of his knowledge, but if he went down then all would go down with him. On the day of the OSHA investigation, September 6th, Mr. Rivas told Mr. Olivares that he was immediately the safety and health officer. Mr. Olivares testified that after Complainant was terminated employees continued to have absences. TR pp. 269-275.

William K. Wright

Mr. Wright testified that he started out as a drum crusher and was promoted to operations supervisor for Employer/Respondent from June 1, 1994. Mr. Wright noted that this was his third drum crushing job. As a drum crusher, Mr. Wright oversaw the drum crushing operators and the helpers who were crushing the drums at the site. As an operations supervisor, Mr. Wright made sure everything was safe, the equipment was working, and that nobody got hurt. Mr. Wright testified that he never saw any employee handbook. Mr. Wright did testify that the issue of employee absences was brought up at a safety meeting, but Complainant was not present because the meeting was for the field area. On September 5th, Mr. Wright testified that Mr. Rivas told him to get everybody together for a meeting concerning the issue of absenteeism and the deadline that was approaching for the completion of the job. Mr. Wright noted that Complainant would come out to the site about once or twice a week to bring water or supplies that were needed. Mr. Wright testified that he could remember that Mr. Mike Moore, an employee, was written up for excessive absenteeism before Complainant was terminated. TR pp. 282-285, 287, 289, 318-319.

Mr. Wright testified that before Mr. McNamara left Mr. Rivas was not at the site often, but after, he was at the site a lot. Mr. Wright noted that Mr. Fife was on the site about once a month. Mr. Wright wrote up Mr. Olivares for excessive absences about two days following Complainant's termination. As a drum crushing supervisor, Mr. Wright would come in every morning and have a safety meeting. Then, all the employees would dress in their proper PP&E equipment. Then, there was one person who would check the area with the HNU meter for fumes or harmful vapors. Mr. Wright testified that the drums were stacked unusually. The drums were lifted or felt to see if they had any liquids or solids in them. Mr. Wright noted that there was a drum that was crushed once that had a smell of gas and odor come off of it. Therefore, the area was evacuated. TR pp. 289-294.

Mr. Wright explained that there were times when he observed drums, that had a hole in them and were sitting up, leaking on the ground. When the drums leaked, the ground was cleaned up with dirt like caliche which would neutralize the acid. Then, one would dump

the caliche and scrape it up with the backhoe. The stuff that was scraped up with the backhoe was put off to the side, but not disposed of. Mr. Wright testified that there was approximately sixty thousand to seventy thousand drums on the site with some of the drums being empty of any substance. Mr. Wright explained that the poly drums were tested with a piece of pH paper. The pH was marked on the side of the drum. If the pH number was compatible, then the chemicals would be poured together. Once the chemicals were poured together, the drums were cut up and quartered. Mr. Wright testified that there was probably as many as one hundred or one hundred and fifty poly drums open on the site at any one time. Mr. Wright noted that the drums were checked with the HNU meter, but there was no harmful reading. Mr. Wright testified that with the poly drums that had more than two inches of chemicals in them there were times after the compatible chemicals were poured together that the open-top drums sat outside where rain water got into them, thereby, spilling the rain water onto the ground. But, Mr. Wright explained that there was only rain water in these drums because the chemicals had been poured out of them. TR pp. 295-299, 320.

Mr. Wright testified that there was approximately thirty-six to thirty-seven parathion drums on the site, but only two drums were found to actually contain the parathion. The parathion drums were put in the southeast corner away from the site where the employees worked and red flagged. Two or three drums at a time were sniffed. Then, on Fridays, Mr. Wright would open the drums up to see if there was an odor. If there was no odor, they were crushed with the backhoe. If there was an odor present, the drums were left until Monday morning at which time they were sniffed again. Mr. Wright testified that all but two of the parathion drums were shipped off to the recycler or crushed. The two drums which contained parathion were removed by the subcontractor. Mr. Wright noted that Mr. Rivas instructed him to crush the parathion drums. The H₂S drums were put in overpack. Mr. Wright did recall one time that he was not sure what the drum contained. Therefore, the drum was left in overpack and set off to the side with the lid off of it which would therefore allow emission into the atmosphere. If there was a drum with a possible hint of H₂S it was set out of the way of the working area and eventually opened. Mr. Wright testified that there were lids that kept popping out of the ground in the road in front of the main building area when someone would drive back and forth on it. Mr. Wright informed Mr. McNamara about it who told him they were going to investigate it. Mr. Wright explained that they began digging a little bit in that area and hit some lids. At that time, they put the dirt back on top of the lids. Mr. Wright informed Mr. Fife and Mr. Anon, who asked him to dig it up again in order to photograph the area. TR pp. 299-304, 322.

Mr. Wright testified that there was one time that the drum count did not equal Mr. McNamara's count. Therefore, to make sure the count was correct, some drums which were already crushed in another area were put to make sure the count was correct. Mr. Wright recalled a conversation he had with Mr. McNamara concerning the hazardous nature of the parathion drums which, in turn, meant they would have to be triple rinsed with acetone and incinerated. Mr. Wright noted that he did not know what happened to the parathion drums when they left the site. For about two weeks, Mr. Wright testified that the HNU was sent off for repair. Therefore, the only air monitoring unit was the Explosimeter. Mr. Wright testified that he did not think the Explosimeter was sufficient. However, Mr. Wright noted that the air monitoring devices never revealed anything dangerous escaping into the air in quantities that were outside of the EPA limits. In addition, Mr. Wright testified that he did not know of any residents around the site who complained of smells or odors from the site. Mr. Wright noted that Mr. Rivas would remove general trash from the site in his pickup. Mr. Wright stated that there was trash in and around the drums that had been left by the owners of the site. These piles of trash were tested by taking a sample out of each pile and sending them off to be tested. Mr. Wright never actually saw the test results, but was told by Mr. Rivas that they were fine to ship off. TR pp. 309-310, 312, 316-317, 323.

Mr. Wright testified that he is still employed by Employer/Respondent as a supervisor on another job site. Mr. Wright explained that he did not have knowledge of the EPA standard on emission of hazardous chemicals. Mr. Wright testified that a couple of days before the OSHA investigation Mr. Rivas told him he was the acting safety person. Mr. Wright testified that he was never promoted to site supervisor. When Mr. Rivas was not on site, there was no project manager or safety and health officer on site. In addition, after Mr. White left there was no QAQC on site. TR pp. 313, 317-318, 336.

Mr. Wright explained the process when something was found in a drum. The drums would be set aside to another area. The drums were checked and sniffed with the HNU. When they were opened, a glass thief would be run down inside of them while another employee had a pH paper. The sample would be put on the pH paper and checked. Then, the number corresponding to the pH would be written on the side of the drum. If the contents were extra heavy and could not be removed to be tested, the drums were deheaded. When drums were emptied because the chemicals had just been mixed together, the empty drums would be taken off to a tank where they would be washed and allowed to dry. Then, the drums would be crushed. The drums that contained the chemicals that had been mixed were removed by another separate subcontractor that had been contracted by Employer to remove any waste products. TR pp, 320-321.

Mr. Wright described the personal protective equipment of the employees. The employees were required to wear a rubber, steel-toed chemical boot, a white Tyvek suit, a latex glove, a nitrile glove, a hard hat, and their respirators. The employees who actually worked on the site went through a 24-hour training program in which there was three days of reading safety procedures and showing them about safety mechanisms and escape routes. In these drills, the employees were trained on what to do if they detected an odor. There were actual safety drills conducted, but an evacuation was never necessary during the time of the project. In addition, there was ongoing training for the employees. Also, Mr. Wright testified that all of the employees had their 40-hour OSHA certification. Mr. Wright explained that there was an emergency wash station in a Suburban and another emergency shower on the north side of the building. In addition, there was an emergency eye wash in the back. Mr. Wright testified that Mr. Fife never complained to him about the site. To his knowledge, Mr. Wright testified that the crushing and removal of the drums was in accordance with EPA standards. TR pp. 323-327.

Mr. Wright testified that Mr. McNamara was lax in terms of enforcing the attendance issues. After Mr. McNamara quit, Mr. Wright recalled Mr. Rivas talking to him about the deadline they had to meet which in turn meant that absences would not be tolerated anymore. Mr. Wright testified that after the OSHA investigation was completed Mr. Rivas told him that he felt it went good. Mr. Wright noted that Mr. Rivas did tell him, about two or three days before the termination of Complainant, that he was upset with Complainant's missing work so much. Mr. Wright went on to explain that Mr. Rivas did inform him that he was intending to fire Complainant because of her excessive absenteeism. Mr. Wright testified that after Complainant was terminated there was an improvement in employee absenteeism. TR pp. 328-329, 331-332.

Mr. Wright testified that the drum logs would be used to keep count of how many drums were crushed each day off of each machine. In addition, the size of the drums and the area they came out of would be noted on the drum logs. Mr. Wright noted that in his opinion Complainant was not asked to falsify drum logs. Mr. Wright testified that a shower facility was added to the job site along with the walls being turned down in order to establish hot, cold, and warm zones. Mr. Wright described the containment area he had laid with three layers of visqueen. When Mr. Wright pulled the visqueen up, the ground underneath was dirty and damp, but the ground was never tested. TR pp. 333-334, 338, 347-348.

Charles M. Rivas

Mr. Rivas testified that he is the owner and president of Rivas Environmental Consultants since June of 1990. The company provides environmental consulting, ground water studies, underground storage tank removals, and industrial and hazardous

waste cleanup operations. Mr. Rivas described his education and employment history. Mr. Rivas has a bachelor of science and master of science in geology. In 1980, Mr. Rivas was employed as a geologist with the U.S. Bureau of Mines in Amarillo, Texas. Then, in 1981, Mr. Rivas went to work for Coastal Oil and Gas Corporation as an exploration and production geologist until 1989. In 1989, Mr. Rivas was hired by the Texas Natural Resource Conservation Commission in San Antonio, Texas as an environmental specialist until June 1990. At that point, Mr. Rivas started his own company, Rivas Environmental Consultants in Amarillo. Mr. Rivas testified that he is a certified professional geologist with the American Association of Petroleum Geologists, a certified environmental professional with Texas, and a licensed on-site supervisor and program manager with the Texas Natural Resource Conservation Commission. TR pp. 431-433.

Mr. Rivas testified that his company was a contractor on a Superfund project at the Odessa Drum Company, the site in question. Mr. Rivas indicated that his company had no ownership or title to the Odessa site, but was strictly the contractor. Mr. Rivas testified that the EPA hired his company to come out to the site and perform a drum removal operation, drum cleaning, and to remove the industrial and/or hazardous waste at the site. Mr. Rivas' company obtained the job through the EPA. The project at the Odessa site started in January of 1995 and was completed in December of 1995. Mr. Rivas explained that he had to submit plans to the EPA prior to being allowed to work on the site. Mr. Rivas had to prepare a complete health and safety plan, a work plan, and a quality/assurance control sampling program which all had to be submitted to the EPA for review and approval. Mr. Rivas testified that Mr. Fife, from the EPA, oversaw the project for that agency. Mr. Rivas noted that Mr. Fife would randomly come to the site about once every month. In addition, the EPA also had a technical assistance team representative, Mr. Anon Hamil, with Ecology and Environment, who would be sent on the site when Mr. Fife was not present. Mr. Rivas explained that the EPA and Ecology and Environment never informed him of any safety or environmental problems with his carrying out of the project. TR pp. 433-437.

Mr. Rivas described the physical layout of the Odessa site. There was an office trailer area, which was completely separate from the actual field activity area. Mr. Rivas testified that the office trailer was about eighty yards from the field area. The project involved mobilization of Areas 1, 2, 3, and 4. Mr. Rivas testified that before any employee started working that employee had to have 40-hour OSHA certification. In addition, the employee would be required to have a physical. Next, the employee reviewed the complete health and safety plan. Then, the employee was issued safety equipment which consisted of hard hat, steel-toe boots, Tyvek or Saranek suits, and full-face respirators. TR pp. 437-439.

Next, Mr. Rivas described the procedure utilized to handle the drum removal. Mr. Rivas testified that before the drums were touched a sample technician would calibrate their instruments such as the HNU meter and Explosimeter. Then, the technician would proceed into the work area and check the drums. Once it was determined that there was no problems with air emissions, the drum crushing team would get the authorization to move into the area. Once the drums were verified as being clean, the drum crusher, operator and his assistant would start removing the drums and passing them to the drum crushing operator who would put the drums into the machine and crush them. If there was a drum with a liquid or solid in it, that drum was moved to the side. Mr. Rivas explained that the project manager or site supervisor was then notified of the drum with the questionable substance. The drum would then be placed in the staging area with a forklift. There would be a sample taken out of the drum with a drum thief, which is a glass tube about three foot long. In addition, the technician would take pH paper to determine its base or corrositivity in order to find out what the nature of the liquid was. During this process, the Explosimeter and HNU meter would be used to detect any emissions. Mr. Rivas testified that once the technicians would determine what type of base or corrosive the substance was the groups would be mixed together in regards to the findings. Mr. Rivas noted that each employee had their own, personal respirator. Once the substances were mixed, there was a subcontractor that was hired, U.S. Pollution Control Company("UPSCI"), to handle the drums. The subcontractor sent their own sampling team to the site first to sample the substances. Then, the subcontractor would collect the drums and transport them to a disposal facility. TR pp. 441-444, 446-447.

Mr. Rivas testified that there was about eight to fifteen employees working on this project who had been hired only for this contract. Mr. Rivas indicated that Complainant was hired on as a data technician to answer the phone mainly, make copies of documents, and record the drums being crushed on a daily basis, which was information she was given by the site supervisor in the field. Mr. Rivas testified that his official title on this project was program manager. As the program manager, Mr. Rivas' duties included being the contact person with the EPA and making sure that the drums were being crushed and the information was being transmitted to the EPA. When Mr. Rivas was not present, the project manager, Mr. McNamara was in charge. When Mr. McNamara quit, Mr. Rivas assumed his responsibilities on the job site. Mr. Rivas explained that he did not replace Mr. McNamara because when he quit, the job was almost seventy-five percent over although he did feel the position of project manager was an important position. TR pp. 447-450, 474.

Mr. Rivas testified that after Mr. McNamara quit he received a phone call from Ms. Norton with the SBA who informed him that she had received a phone call from Mr. McNamara and Mr. Maynard

concerning complaints about equipment usage, cost, and supplies and materials at the project. Mr. Rivas testified that at this time he received a call from Mr. Fife at the EPA to inform him that because of a lack of money for the project the project should be stepped up as far as the deadline. Therefore, Mr. Rivas noted that he decided to inform the employees that absenteeism would no longer be tolerated because the project had to be finished earlier. First, Mr. Rivas notified the site supervisor, Mr. Wright, about the situation. Then, during the first break of the employees on the job site on September 5th, Mr. Rivas informed them that absenteeism would have to stop because they were on a crucial timetable. Mr. Rivas testified that the day he informed the workers happened also to be the first day Mr. White started his job. Therefore, Mr. Rivas was introducing Mr. White to the office as Complainant was sitting at her desk in the front area. Mr. Rivas indicated that he directed the conversation to both Mr. White and Complainant that absenteeism would not be tolerated because of the deadline. TR pp. 450-453, 455-456.

In addition, on September 5th, Mr. Rivas testified that Ms. Shulleberger of OSHA arrived to investigate some safety complaints. Mr. Rivas indicated that the complaints were related to the field area, but were all safety issues. The investigation took three days. Mr. Rivas testified that Ms. Shulleberger never identified who had filed the complaint. Mr. Rivas explained that the reason Ms. Shulleberger was not allowed on the field site was because in order to enter a hazardous waste or industrial waste facility the OSHA regulations state that the person must have a 40-hour OSHA certification which she did not have. But, Mr. Rivas testified that he did inform her that she could bring another representative from OSHA to come to the site. Mr. Rivas noted that he was never told by anyone who contacted OSHA and never asked anyone about the issue. On September 11th, Mr. Rivas received a call from Mr. Fife who told him that Mr. McNamara had contacted the EPA. Mr. Rivas also explained he was told that Mr. McNamara also contacted the IRS. Therefore, Mr. Rivas assumed that Mr. McNamara and Mr. Maynard were the ones who initially called OSHA. Mr. Rivas testified that he never had reason to think Complainant had contacted OSHA because she was an office worker who never had any on-site experience of what was going on the job site. In addition, Mr. Rivas noted that Complainant had never voiced any safety related complaints to him personally or at the weekly meetings she attended. Mr. Rivas next contacted his attorney, Mr. Thomas E. Reddin, to discuss the situation with Mr. McNamara and Mr. Maynard. Mr. Rivas testified that Mr. Reddin sent both Mr. McNamara and Mr. Maynard a letter to try to prevent any more false statements. But, Mr. Rivas noted that this letter was never sent to Complainant because he did not believe she was the kind to raise these issues. TR pp. 456-461, 463-467.

Mr. Rivas testified that Complainant's absences caused disruption because himself and Mr. White had to absorb some of her responsibilities. Mr. Rivas testified that he never told Mr. White that he intended to squeeze out Complainant. Mr. Rivas indicated that he did tell Mr. White that because the job was winding down Complainant's position would be phased out. Mr. Rivas testified that he never told Mr. White that he was suspicious of Complainant's interview with OSHA because it had taken longer than the others. Mr. Rivas noted that on September 25th Complainant had to depart the office about 9:30 that morning to bring her son to the doctor, but she never returned or called. As Mr. Rivas was going through his in-basket on that same day he noticed a request from Complainant for more time off in October. At that point, Mr. Rivas testified that he made up his mind about terminating Complainant. When Mr. Rivas next saw Complainant on September 27th, he walked to her vehicle and informed her he was terminating her because of excessive absenteeism. Mr. Rivas did indicate that Complainant asked for a copy of her personnel file and time records, but Mr. Rivas told her she could not have a set. Mr. Rivas testified that the reason he told her she could not have her records was because he did not want to go with her into the office and probably start a confrontation. Mr. Rivas noted that he did not hire a replacement for Complainant. Mr. Rivas testified that if Complainant had not been fired in September her position was in any way going to be phased out in October of 1995 because the job was winding down. TR pp. 467-474.

Mr. Rivas testified that Complainant was responsible for the drum logs. In addition, Mr. Rivas noted that errands would be distributed among employees one of which was Complainant. Mr. Rivas was also aware that Complainant handled the medical records, appointments, and issuing of safety supplies to new employees. Mr. Rivas testified that the qualifications he had to be a safety and health officer are that he had taken continuous courses on health and safety issues. Mr. Rivas testified that he was not aware of any drums leaking onto the ground. Mr. Rivas did testify that he was given permission by Mr. Fife of the EPA that if rain water was in the drums that could be dumped on the ground. Next, Mr. Rivas admitted that not every poly drum was triple rinsed. Mr. Rivas testified that there may have been residue in the poly drums. Mr. Rivas noted that he did personally transport paper trash and cardboard boxes from the site. TR pp. 479-480, 489-492, 493.

Mr. Rivas explained that all the parathion drums already had holes in them except for two which were the ones that were transported off the site by the subcontractor, UPSCI. The remaining thirty-four parathion drums were crushed without being triple rinsed because Mr. Rivas testified that according to EPA standards if there is less than two inches of substance in a drum then the drum can be disposed of without being triple rinsed. In addition, Mr. Rivas stated that the remaining parathion drums were

completely empty. Mr. Rivas described the preventive measures that were taken under the drum crushers. Mr. Rivas explained that they started out utilizing the large, heavy plastic square containers which were about two inches high and set underneath the drums. Mr. Rivas admitted that after a period of time one of the containers did show some cracks on it, but it was never replaced. To his knowledge, Mr. Rivas testified that every drum that had contents in it was tested before it was crushed. TR pp. 495-496, 501-502.

Discussion and Conclusions of Law

CERCLA § 9610 provides in pertinent part as follows:

(a) Activities of employee subject to protection

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a)(1980).

The objectives of CERCLA are to encourage maximum care and responsibility in the handling of hazardous waste, to provide for rapid response to environmental emergencies, to encourage voluntary clean-up of hazardous waste spills, to encourage early reporting of violations of the statute, and to ensure that parties responsible for the release of hazardous substances bear the costs of response and costs of damage to natural resources. Chemical Waste Management v. Armstrong World Indust., 669 F. Supp. 1285, 1290 n.6(E.D. Pa. 1987).

To establish a prima facie case of retaliatory discharge under the whistleblower provision invoked here, a complainant must show that: (1) the complainant engaged in protected activity; (2) the

employer was aware of that protected activity; and (3) the employer took some adverse action against the complainant. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8. In this case, there is no issue of the fact that Employer did take some adverse action, termination, against Complainant. The presence or absence of a retaliatory motive is provable by circumstantial evidence even if witnesses testify that they did not perceive such a motive. See Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566(8th Cir. 1980), cert. denied, 450 U.S. 1040(1981). Circumstantial evidence may raise the inference that a protected activity was the likely reason for an adverse action. Schweiss v. Chrysler Motor Corp., 987 F.2d 548, 549(8th Cir. 1993).

If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. The employer bears only a burden of producing evidence at this point. The ultimate burden of persuasion remains with the employee. If the employer rebuts successfully the employee's prima facie case, the employee still has the opportunity to prove that the proffered reason was not the real reason for the employment decision. The employee may succeed in this by either persuading directly the court that a discriminatory reason more likely motivated the employer or by either showing indirectly that the employer's proffered explanation is unworthy of credence. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee had proved actionable retaliation for protected activity. However, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248(1981).

I. Whether there was a timely written complaint?

CERCLA § 9610 provides in pertinent part as follows:

- (b) Administrative grievance procedure in cases of alleged violations

Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection(a) of this section may, within thirty days after such alleged violation

occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination.

42 U.S.C. § 9610(b)(1980).

In addition, an employee who believes that he or she has been discriminated against must file a written complaint within thirty days after the occurrence of the alleged violation. See 29 C.F.R. § 24.3. The Court has held in a previous case that a complainant's filing with OSHA rather than Wage & Hour was a timely filing and that OSHA's memorandum of the complaint satisfied the "in writing" requirement. Dartey, supra, slip op. at 8.

In this case, Complainant was terminated from employment on September 27, 1995. Before her termination, Complainant spoke with Ms. Bradley from the Department of Labor and sent her a letter with her complaints which Ms. Bradley received on August 17, 1995. In the letter, Complainant voiced her concerns over insufficient air monitoring, inadequate containers for storage of hazardous waste, and various other concerns. CX-1 pp. 1-2. On September 27th, the day of her termination, Complainant talked to Ms. Nardizzi and gave her an oral statement. Ms. Nardizzi then prepared the statement as an internal memorandum and faxed it to Complainant. In the statement, Complainant discussed that the employees on the site would open up the drums of chemicals without proper monitoring and without knowing what the drums contained. In addition, Complainant stated there was no safety officer on site. Complainant stated that she felt that one of the drums could blow up and hurt someone. CX-2 p. 1. The Court finds the reasoning in Dartey to be applicable to the case at hand. Under Dartey, Complainant's oral statement to Ms. Nardizzi from OSHA and the subsequent preparation of an internal memorandum by Ms. Nardizzi of the complaints would satisfy the time limitation and the "in writing" requirements.

II. Whether Complainant engaged in protected activities under CERCLA?

The Secretary of Labor has consistently held that an employee who makes an internal safety complaint or an external complaint to government officials is protected under the whistleblower provisions of environmental statutes. See Mackowiak v. University Nuclear Systems, Inc., 82-ERA-8(Sec'y, Apr. 29, 1983), aff'd 735 F.2d 1159(9th Cir. 1984); Couty v. Dole, 886 F.2d 147(8th Cir. 1989). The Fifth Circuit has held that the filing of an intracorporate quality control report is not protected activity under the Energy Reorganization Act. Brown v. Root, Inc. v. Donovan, 747 F.2d 1079(5th Cir. 1984). However, the Secretary has declined to follow this decision even within the Fifth Circuit. See Hasan v. Nuclear Power Servs. Inc., 86-ERA-24(Sec'y June 26, 1991); Bivens v. Louisiana Power & Light, 89-ERA-30(Sec'y July 26, 1988); Willy v. Coastal Corp., 85-CAA-1(Sec'y June 4, 1987). Not

all internal complaints to management are to be considered protected activity under the environmental statutes. An employee's concerns must be based on incidents which are "reasonably perceived violations of the environmental acts." See Minard v. Nerco Delamar Co., 92-SWD-1(Sec'y, Jan. 25, 1994). The expression of general safety concerns, rather than environmental concerns, would not be protected activity. See Minard, supra, slip. op. at 3.

In this case, Mr. Rivas, Employer/Respondent, testified that Complainant did not voice any safety-related complaints to him. However, Complainant testified that she voiced complaints to Mr. Rivas, Mrs. Rivas, and Mr. McNamara. Complainant testified that she told Mr. Rivas about her concerns about the hot, cold and warm zones that she felt were not properly set up. In addition, Complainant testified that she discussed with Mr. Rivas the issue of the poly drums being opened and the danger of emission into the air. Complainant also discussed her concerns with Ms. Rivas. Complainant explained that she spoke to Ms. Rivas on a daily basis. Complainant testified that she told Ms. Rivas that she was afraid that chemicals were being spilled on the ground and that an employee could spill the chemicals on himself because the employees were using an old light fixture to pour chemicals. Complainant recommended to Ms. Rivas buying drum funnels from another drum company. Complainant also discussed with Mr. McNamara the problem with leakage from the drum crusher spilling onto the ground. Mr. McNamara testified that Complainant did discuss with him some of her initial complaints that she voiced to Ms. Bradley with him. In addition, Complainant spoke with Ms. Bradley from the Department of Labor about her complaints and with Ms. Shulleberger with OSHA. In her conversation with Ms. Bradley, Complainant voiced complaints about there not being a health and safety officer on site, no QAQC on site, and adequately trained personnel. Moreover, Complainant stated that the health and safety program was incomplete, the personal protective equipment was inadequate, the air monitoring was insufficient, the container labeling was inadequate, and the spill response equipment was inadequate. Complainant also voiced other concerns such as no shower or changing facilities, no corporate health and safety program, inadequate medical monitoring, and other concerns. CX-1 pp. 1-2. After Complainant sent a letter outlining these various complaints to Ms. Bradley, Ms. Shulleberger with OSHA conducted an investigation on the site. Complainant testified that in regards to CERCLA, on the same day of her termination, she called Ms. Nardizzi and made an oral complaint concerning the employees opening up drums of chemicals without monitoring or knowing what the drums contained. Complainant told Ms. Nardizzi that she was concerned that the drums would blow up and hurt someone one day. CX-2 p.1.

In this case, the Court notes that Complainant failed to prove that her complaints were other than general safety concerns. The only mention of environmental concerns occurred with her alleged conversation with Mr. Rivas which he denied and her conversation

with Ms. Rivas. Complainant also alleged she spoke to Mr. McNamara about the danger with leakage from the drum crusher, but Mr. McNamara testified that he discussed with Complainant some of the initial complaints she voiced to Ms. Bradley. The complaints voiced to Ms. Bradley and Ms. Nardizzi did not contain complaints which were connected to the whistleblower provision invoked in this case. Accordingly, the Court finds that Complainant has not met her burden of protected activity under the statute.

In any case, Employer has proven that he was not aware of the protected activity and had an independent, legitimate reason to terminate Complainant. Mr. Rivas testified that he believed Mr. McNamara or Mr. Maynard were the ones who complained to OSHA because he received a call from Ms. Norton with the SBA who informed him that she had received a call from Mr. McNamara and Mr. Maynard complaining about equipment usage, cost, and supplies and materials at the site. Mr. Rivas testified that he was never informed about who contacted OSHA. Mr. Rivas noted that he also received a call from Mr. Fife who told him that Mr. McNamara had contacted the EPA and IRS. Mr. Rivas testified he had no reason to believe Complainant was the one who initially called OSHA because she was an office worker who never had any on-site experience of what was going on the job site. Additionally, Mr. Rivas noted that Complainant never voiced any concerns to him personally or at the safety meetings she attended. Therefore, the undisputed facts prove that Complainant has not produced evidence to prove that Employer was aware of any alleged protected activity. Moreover, the Employer established a legitimate, nondiscriminatory reason for the alleged disparate treatment, that of excessive absenteeism on the part of Complainant. Mr. Rivas testified that Complainant's absences caused disruption because himself and Mr. White had to absorb some of her responsibilities. Mr. Rivas indicated that he did tell Mr. White that because the job was winding down Complainant's position would be phased out. Mr. Rivas testified that he never told Mr. White that he was suspicious of Complainant's interview with OSHA because it had taken longer than the others. Mr. Rivas noted that on September 25th Complainant had to depart the office about 9:30 that morning to bring her son to the doctor, but she never returned or called. As Mr. Rivas was going through his in-basket on that same day he noticed a request from Complainant for more time off in October. At that point, Mr. Rivas testified that he made up his mind about terminating Complainant. Complainant testified that during her time with Employer she missed 38.5 hours, 24.5 of which were taken in the month of September. Mr. Wright, the operations supervisor, testified that two or three days before the termination of Complainant Mr. Rivas informed him that he was intending to fire Complainant because of her excessive absenteeism.

In conclusion, Complainant has failed to prove various elements of her case. Accordingly, Complainant has not established her prima facie case. Therefore, this complaint must be dismissed.

RECOMMENDED ORDER

It is, therefore, ordered, adjudged and decreed that the complaint is hereby DISMISSED.

JAMES W. KERR, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982(1996).